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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 618

ALABAMA POWER COMPANY,

Petitioner,

v.

ALABAMA ELECTRIC COOPERATIVE, INC., a corporation; RURAL ELECTRIFICATION ADMINISTRATION; NORMAN M. CLAPP, Administrator of the Rural Electrification Administration; THE UNITED STATES DEPARTMENT OF AGRICULTURE; and ORVILLE L. FREEMEN, Secretary of the United States Department of Agriculture,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The antitrust laws are being frustrated by a denial to injured parties of access to the courts. Hence, Alabama Power Company, a corporation organized under the laws of the State of Alabama, is here petitioning for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit entered in the above styled case on

April 2, 1968, and to review the order of such court entered on July 11, 1968, denying petitioner a rehearing.

OPINIONS BELOW

The majority and minority opinions of the United States Court of Appeals for the Fifth Circuit (R 320-366) are reported at 394 F.2d 672-692. Such opinions, together with the judgment entered thereon (R 368) and the order denying petition for rehearing (R 469), are appended hereto as Appendix A. The opinion of the United States District Court for the Middle District of Alabama (R 299-309) is reported at 249 F. Supp. 855. Such opinion and the order entered thereon (R 309) are appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit sought to be reviewed was made and entered April 2, 1968 (R 368). Petition for rehearing was timely filed on April 23, 1968 (R 369-414). Such petition for rehearing was denied July 11, 1968 (R 469). Issuance of mandate was stayed until August 17, 1968, by order entered July 17, 1968. Issuance of mandate was again stayed until October 9, 1968, by order entered July 16, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

Alabama Power Company's suit in the district court was filed, *inter alia*, under Section 16 of the Clayton Act (15 U.S.C. § 26 and Appendix C, page 61a) seeking to enjoin certain

violations of the antitrust laws alleged to have occurred when Alabama Electric Cooperative, Inc., an Alabama corporation, entered into numerous 35 year, all-requirements, exclusive dealing contracts for the sale of electric power to customers and potential customers of Alabama Power Company. These contracts provide for the sale of all electric power consumed in a vast geographic area of the State of Alabama and have the effect of foreclosing Alabama Power Company and others from the opportunity to sell electric power in a substantial market area. The Administrator of the Rural Electrification Administration ("REA") was an active participant in such contracts and is alleged to have applied coercion to accomplish the signing of the contracts. The district court dismissed the suit without a hearing on the merits on the ground that Alabama Power Company lacks standing to sue. The Court of Appeals, by a divided vote, affirmed such dismissal. The questions presented are:

1. Does Alabama Power Company have standing under Section 16 of the Clayton Act (15 U.S.C. § 26) to sue Alabama Electric Cooperative, Inc. (a private corporation organized under the laws of Alabama) to enjoin its violations of the antitrust laws by entering into numerous 35 year, all-requirements, market foreclosure, electric power contracts executed with customers and potential customers of Alabama Power Company where such contracts (a) forbid such customers from purchasing from Alabama Power Company, (b) require such customers to purchase only from Alabama Electric Cooperative, Inc., and (c) effectively deny to Alabama Power Company for 35 years one-third of the State of Alabama as a market area?

2. Does Alabama Power Company have standing under Section 16 of the Clayton Act (15 U.S.C. § 26) or under the rule most recently confirmed in *Hardin v. Kentucky Utilities Company*, ____ U.S. ____, 19 L. Ed. 2d 787 (Case No. 40 decided January 16, 1968), or under Section 10(a) of the Administrative Procedure Act (5 U.S.C. § 702) to challenge or review in the federal courts actions of the REA Administrator which were part of a conspiracy to violate the antitrust laws?

3. Is Alabama Electric Cooperative, Inc. (a private corporation organized under the laws of Alabama) an instrumentality of the United States?

4. Has Alabama Electric Cooperative, Inc. (a private corporation organized under the laws of Alabama) received immunity from the antitrust laws either by Congressional act or through the REA Administrator as a conduit so that Alabama Power Company (an injured competitor of Alabama Electric Cooperative, Inc.) has no standing under the antitrust laws to challenge in the federal courts numerous 35 year, all-requirements, market foreclosure, electric power contracts extracted by Alabama Electric Cooperative, Inc. from customers and potential customers of Alabama Power Company?

5. Was Alabama Power Company entitled to a hearing on the merits to determine whether the Administrator of REA was acting beyond the outer perimeter of his authority when, as an alleged active participant in a conspiracy to deprive Alabama Power Company of one-third of the State of Alabama as a

market area, he assisted Alabama Electric Cooperative, Inc. in coercing numerous customers and potential customers of Alabama Power Company into signing 35 year, all-requirements, exclusive dealing, market foreclosure, electric power contracts with Alabama Electric Cooperative, Inc.?

6. Does the complaint state against any of the defendants a claim which Alabama Power Company had standing in the federal courts to pursue?

STATUTES INVOLVED

Pertinent parts of Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C. §§ 1 and 2), of Sections 3 and 16 of the Clayton Act (15 U.S.C. §§ 14 and 26), of Section 10(a) of the Administrative Procedure Act (5 U.S.C. § 702)[1] and of Section 4 of the Rural Electrification Act of 1936 (7 U.S.C. § 904) are set forth as Appendix C.

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[1] Section 10(a) of the Administrative Procedure Act of 1946, formerly codified in 5 U.S.C. § 1009, was included in Pub. L. No. 89-554 (Sept. 6, 1966), 80 Stat. 378, entitled "Government Organization and Employees." Such Pub. L. No. 89-554 accomplished a complete revision of Title 5 of the United States Code. Former § 1009 (Section 10(a) of the Administrative Procedure Act of 1946) is now § 702 of Title 5. In this petition it will be referred to as 5 U.S.C. § 702 or as Section 10(a) of the Administrative Procedure Act.

STATEMENT OF THE CASE

Statement of facts[2]

Alabama Power Company is a regulated public utility authorized by Alabama law to provide electric power in fifty-five Alabama counties in which it operates pursuant to nonexclusive franchises. These counties comprise the entire state of Alabama except the northern few counties which are in the area served by the Tennessee Valley Authority (R 3, 281). Alabama Power Company has invested over one billion dollars in its electric facilities to enable it to provide such electric power. At the time it filed its complaint in the district court, Alabama Power Company was selling electric power at wholesale to many customers, including twelve of the fourteen rural electric distribution cooperatives operating within such fifty-six counties (R 4-5, 282-283).

Alabama Electric Cooperative, Inc. is a private corporation organized under the laws of the State of Alabama and is engaged in generating and transmitting electric power which it sells primarily at wholesale for resale. It is a competitor of Alabama Power Company. At the time the complaint was filed in this case, a substantial portion of the sales by Alabama Electric Cooperative, Inc. were being made to five of the same fourteen rural electric distribution cooperatives for whose

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[2] Since the district court dismissed this case on motion of the defendants without a hearing, the allegations in the complaint, both in the court below and in this Court, must be taken as true. As stated by Circuit Judge Godbold: "The complaint—and at this stage we take its allegations as true—sets out a classic case of an exclusive supply contract which violates Section 3 of the Clayton Act because it forecloses in the relevant market a substantial share of the line of commerce affected." (394 F.2d 672, 679 and Appendix A, pages 16a-17a)

business it competes with Alabama Power Company. In addition, Alabama Electric Cooperative, Inc. sells at wholesale to a rural distribution cooperative in northwest Florida (in competition with Gulf Power Company) and to four municipalities in Alabama. It also sells at retail to two textile industries in Alabama (R 2-5, 282-287).

The resale by the fourteen rural electric distribution cooperatives, for whose business Alabama Power Company and Alabama Electric Cooperative, Inc. compete, constitutes a substantial portion of all sales of electric power in a substantial geographic area of the State of Alabama (R 295).

In 1960, Alabama Electric Cooperative, Inc. entered into 35 year, all-requirements, exclusive dealing, wholesale power supply contracts with most, if not all, of these fourteen rural electric distribution cooperatives. The complaint in this case alleges that these 35 year requirements contracts are unlawful. They are part of an overall conspiracy to eliminate from the electric market available to Alabama Power Company at least one-third of the rural areas of the State of Alabama for the balance of the twentieth century and thereby to restrain trade by contract in violation of the antitrust laws (R 10-13, 285-288, 293-298).

The Administrator of REA was an active participant in this conspiracy and "used the power and prestige of his office and position to coerce such distribution cooperatives into executing such illegal contracts" (R 12). All these distribution cooperatives, which are also private corporations organized under the laws of Alabama, are dependent upon REA for funds and are readily subject to pressure and coercion from the Administrator.

In 1961, in furtherance of such conspiracy, the REA Administrator authorized a $20,350,000 loan to Alabama Electric Cooperative, Inc. to enable it to construct facilities to supply electric power in implementation of certain of such 35 year contracts. The electric power to be supplied by such new facilities would supplant "central station service" then being supplied by Alabama Power Company (R 8-9) notwithstanding the limitation in Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. § 904 (Appendix C, page 61a), which prohibits loans for the purpose of furnishing electric power to persons already receiving central station service. The Administrator was a party to the 35 year contracts *between* private Alabama corporations which are alleged to be proscribed by the antitrust laws and the Administrator's commitment to grant such loan was conditioned upon the execution of such contracts (R 11-13).

Alabama Power Company filed a complaint in the United States District Court for the Middle District of Alabama (R 1-33) against Alabama Electric Cooperative, Inc. to enjoin such unlawful 35 year contracts, *expressly alleging standing to sue under Section 16 of the Clayton Act*, 15 U.S.C. § 26.[3] Several governmental defendants, primarily the Administrator of REA, were also included in the suit. The complaint also sought a declaration that the 35 year contracts, being in violation of the antitrust laws, were void and sought to review the loan itself to the extent that it was predicated on such 35 year contracts and to the extent that it was otherwise unlawful.

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[3] 15 U.S.C. § 26, provides: "Any person, firm, corporation or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . ."

The District Court decision

Notwithstanding (a) the *express* provisions of Section 16 of the Clayton Act giving standing to sue to *anyone* threatened with damage by antitrust violations, (b) the fact that defendant Alabama Electric Cooperative, Inc. was a private Alabama corporation, (c) the fact that the contracts were *between private Alabama corporations* and were alleged to constitute an unlawful restraint upon trade, (d) the allegations of coercion by the Administrator as an active co-conspirator, and (e) the allegations of facts showing that the Administrator acted *beyond* the scope or outer perimeter of his authority, the district court, on motion of the defendants, dismissed the suit as to all parties (R 309 and Appendix B, page 58a), having first denied Alabama Power Company the opportunity to take the deposition of the Administrator to lay open the conspiracy (R 40-41). The district court, in dismissing the case as to *all* defendants without a trial on the merits as to *any* defendant, made no findings of fact but predicated its dismissal on what it understood to be the absence of *any* standing of Alabama Power Company to maintain the suit (R 299-309 and Appendix B, pages 47a through 57a).

The Court of Appeals decision

The Circuit Court of Appeals for the Fifth Circuit affirmed the dismissal of the case by the district court (R 320-368 and Appendix A, pages 1a-45a). Circuit Judge Godbold wrote an extensive dissenting opinion in which he strongly disagreed with the majority opinion (R 331-366 and Appendix A, pages 12a-45a).

The majority opinion recognized that, if the REA Administrator went beyond the outer perimeter of his authority by his participation in the antitrust violations, he might lose his immunity and Alabama Power Company might have standing to sue. Notwithstanding this recognition, such opinion summarily denied a hearing to determine factual issues directly bearing on whether such outer perimeter had been exceeded. The dissenting opinion emphatically stated that the pleadings, affidavits and exhibits "squarely raise a factual issue of whether the Administrator is acting within or without his outer limits" (394 F.2d 672, 685 and Appendix A, pages 29a-30a) and described the majority's holding as the coupling of "a privilege for acts done within the perimeter with immunity from judicial investigation of where the perimeter lies," thus expanding "the privilege into immunity for any act done" (394 F.2d 672, 686 and Appendix A, page 30a). Neither the district court nor the majority opinion below reached the issue of whether the 35 year contracts are proscribed by the antitrust laws. As stated in the dissenting opinion (Appendix A, pages 16a-17a):

> "... They simply decline to scrutinize them. The complaint—and at this stage we take its allegations as true—sets out a classic case of an exclusive supply contract which violates Section 3 of the Clayton Act because it forecloses in the relevant market a substantial share of the line of commerce affected. ..." (394 F.2d 672, 679)

The majority opinion failed to consider the standing to sue expressly conferred upon Alabama Power Company by Section 16 of the Clayton Act, 15 U.S.C. § 26 (Appendix C, page 61a). Indeed the opinion did not even cite the statute or refer to the

suit having been filed thereunder. The dissenting opinion expressly found standing to sue under such Section 16 of the Clayton Act.

Even though the only relation of Alabama Electric Cooperative, Inc. to the United States is that of a borrower of REA funds, the majority opinion held Alabama Electric Cooperative, Inc. to be an instrumentality of the United States. The effect of such a holding would convert into "instrumentalities of the United States" (Appendix A, page 11) other authorized borrowers of REA funds, including "persons, corporations, States, Territories, and subdivisions thereof, municipalities" (Section 4 of the Rural Electrification Act, 7 U.S.C. § 904).

Both the majority opinion and the dissenting opinion expressly recognized that this case presented unique and serious questions of exceptional importance heretofore unanswered by the courts. As stated in the majority opinion (Appendix A, page 10a):

> "Finally, a unique question presented by the Power Company must be answered. This is the first of the attacks by private power companies on federal loans to competitors in which there has been a *separate* attack on the borrower and those alleged to be in conspiracy with it for claimed violation of the antitrust laws. It is argued that there is nothing in the Act or in its legislative history which authorizes the Administration [sic] to grant immunity to the borrower, AEC, and that at the very least the plaintiff has a right to pursue its antitrust suit against AEC. . . ." (394 F.2d 672, 676-677)

The dissenting opinion expressed it as follows (Appendix A, page 12a):

> *"This case presents in bold and clear form issues not heretofore judicially determined* of the interplay between, on the one hand, the antitrust laws and the national policy which they represent and, on the other hand, the Rural Electrification Act and national policies of aid to rural citizens without electric service. *In addition there are vital factual issues which have been neither determined nor reached,* since the decision below was a dismissal for lack of standing to sue." (Emphasis supplied) (394 F.2d 672, 677)

Petition for rehearing was duly filed (R 369-414), which petition was denied in a divided opinion rendered July 11, 1968 (R 469 and Appendix A, page 46a). Alabama Power Company has thereby been denied a hearing on the merits to scrutinize the monopolistic 35 year contracts and the unlawful conspiracy of which they are a part.

REASONS FOR GRANTING THE WRIT

Reason I: **An important question of federal law which has not been, but should be, settled is involved in this case.**

"This case presents in bold and clear form issues not heretofore judicially determined of the interplay between, on the one hand, the antitrust laws and the national policy which they represent and, on the other hand, the Rural Electrification Act and national policies of aid to rural citizens without electric

service." Dissenting opinion of Circuit Judge Godbold, 394 F.2d 672, 677 and Appendix A, page 12a.

"This is the first of the attacks by private power companies on federal loans to competitors in which there has been a separate attack on the borrower and those alleged to be in conspiracy with it for claimed violation of the antitrust laws." Majority opinion, 394 F.2d 672, 676 and Appendix A, page 10a.

It is perfectly clear from the foregoing that "an important question of federal law which has not been, but should be, settled" is involved in this case (Rule 19, Rules of the Supreme Court of the United States).

This is the first case bringing into focus the interplay between the Rural Electrification Act and the antitrust laws. It raises the question as to whether a private corporation, as a *borrower* of REA funds, enjoys immunity from the antitrust laws and can thus enter into contracts which are classic violations of such laws. The court below has fashioned such immunity, the far-reaching implication of which was noted in the minority opinion (Appendix A, page 25a):

> "... It boggles the imagination to suggest that the myriad of government agencies having the power to lend (each based on Congressional determination that the particular lending power authorized is in the national interest) are, by reason of routine administrative control over sufficiency of collateral, vested with implied power to carve out of the national economy exempt enclaves in which borrowers may deal free of the antitrust laws." (394 F.2d 672, 683)

The practice of using such monopolistic contracts as security for loans has never been challenged in the courts and is likely to continue so long as it is clothed with immunity from attack. Indeed, the affidavit of the REA Administrator filed in the district court states "It has been the practice for many years of REA Administrators, including the affiant, to require as a condition of making generating and transmission loans pursuant to Section 4 . . . that the borrower shall obtain 35 year contracts" (R. 226). Such practice is a matter of far-reaching and serious consequence upon which this Court should focus. Such practice, if allowed to continue unbridled and insulated by the immunity from the antitrust laws which the court below has fashioned, will result in a large segment of the consumers of electric power throughout the nation becoming the ultimate victims of an ever-increasing monopoly.

A brief reference to the *1966 Annual Statistical Report* of the Rural Electrification Administration [4] shows that as of December 31, 1966, there were 993 active borrowers from REA. Of this number, 927 were electric cooperatives. As of such date, more than 5,650,000 electric consumers were served by active REA borrowers. These consumers purchased more than 45 *billion* (45,000,000,000) kilowatts of electric energy in 1966 and were located in 46 different states and in Puerto Rico and the Virgin Islands.

The proportion of loans being made by the REA Administrator to so-called "power supply borrowers," such as Alabama Electric Cooperative, Inc. in this case, for generating and transmission purposes as distinguished from distribution purposes, has been at a high level for several years despite the fact that virtually all of the United States has electric power

[4] REA Bulletin 1-1, at pages 5-11, published in August, 1967, by the United States Department of Agriculture.

generated from central station generators. REA loans approved under Section 4 of the Rural Electrification Act for fiscal years 1962-1966 amounted to $1,555,591,000. Of this amount, more than half, $858,908,000, was for generating and transmission facilities.[5] Moreover, "power supply borrowers" are producing an increasing proportion of all electric power marketed by REA borrowers. The *28th Annual Report of Energy Purchased by REA Borrowers Fiscal Year Ended June 30, 1966* (REA Bulletin 111-2, at page 7) shows that such proportion increased from 12.8% in 1950 to 19.6% in 1966. Thirty-five year contracts similar to the ones involved in this case have doubtlessly contributed greatly to this growth.

Thus, this Court should recognize that judicial inquiry should not end simply because it has been the practice of REA Administrators to require 35 year, all-requirements contracts as a condition to making generating and transmission loans. It is respectfully submitted that such practice is destined to carve out larger and larger segments of the electric power market in which increasing numbers of ultimate consumers will be tied to a system of wholesale power supply which by contract excludes existing utilities and forecloses them from an opportunity to compete for this growing market.[6]

Such practice of the Administrator was put in proper perspective in the dissenting opinion (Appendix A, page 16a):

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[5] Page 1094, transcript of hearings before the Subcommittee of the Committee of the United States Senate on Appropriations for the Department of Agriculture, 90th Congress.

[6] See *Pennsylvania Water & Power Co. v. Consolidated Gas, Electric Light & Power Co.*, 184 F.2d 552, 558 (4th Cir. 1950), *cert. denied*, 340 U.S. 906, where the Fourth Circuit held that an electric power agreement "which forecloses competitors from a substantial market" violates the Sherman Act.

> "... There is no right by prescription to violate the antitrust laws. This theory that governmental action can bootstrap itself to a state of validity is expressly adopted by the majority, who conclude that in making the contracts the Administrator was not beyond the outer perimeter of his authority because he was 'doing nothing unusual, but was simply following customary and long-established REA practice.' " (394 F.2d 672, 679)

The complaint sets forth contracts of a character which the courts have traditionally banned as violative of the antitrust laws. As an injured party, petitioner is expressly given standing to sue by Section 16 of the Clayton Act, 15 U.S.C. § 26 (Appendix C, page 61a). This case thus squarely presents the issue of whether Congress granted immunity from the antitrust laws by the Rural Electrification Act to REA borrowers and to those with which they contract.

Reason II: **The opinion below decided a federal question in conflict with applicable decisions of this Court.**

The Rural Electrification Act of 1936, 7 U.S.C. §§ 901, et seq., does not expressly grant immunity from the antitrust laws *to borrowers* of REA funds nor *to the Administrator* of REA. Moreover, there is nothing in the Rural Electrification Act of 1936 from which a congressional intent to grant such immunity is manifestly implied. Nevertheless the majority opinion below grants an *implied* immunity to *each* of the defendants. This *implied* immunity is in conflict with *California v. Federal Power Commission*, 369 U.S. 482 (1962):

> "Immunity from the antitrust laws is not lightly implied. . . ." (p. 485)

and in conflict with *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963):

> ". . . Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions." (pp. 350, 351)

The majority opinion below concluded that the provisions of Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. § 904 (Appendix C, page 61a), which authorize the REA Administrator to determine the "terms and conditions" of the security for an REA loan, grant an immunity from the antitrust laws. It held that such Section 4 empowers the Administrator to accept 35 year, exclusive dealing contracts as security for a loan even though such contracts violate the antitrust laws. The opinion reasoned that "Anything less might well mean the acceptance of inadequate security" (394 F.2d 672, 676 and Appendix A, page 9a).

The legislative history of the Rural Electrification Act of 1936 clearly demonstrates congressional intent not to authorize REA loans for the purpose of competing with existing public utilities.[7] Opinions by two separate Solicitors of the Department of Agriculture state that the debates in Congress and committee hearings demonstrate that Congress sought to

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[7] See legislative history of the Rural Electrification Act cited in footnote 17 of the dissenting opinion of Circuit Judge Godbold, 394 F.2d 672, 683 and Appendix A, page 26a.

prevent such competition.[8] Nevertheless, the majority opinion below holds that Congress impliedly authorized not only competition with existing public utilities but also a *foreclosure* of the opportunity of an existing utility to compete with an REA borrower. Such authority was found by the provisions of Section 4 of the Act permitting the Administrator to set the "terms and conditions" of the security for a loan. But the "terms and conditions" contemplated by Congress were *lawful* terms and conditions such as would be consistent with the "charter of economic liberty" contained in the antitrust laws. Congress doubtless intended the security to be mortgages, deeds of trust, pledges of collateral, assignments of accounts receivable and other "lawful" forms of security. Congress certainly did not intend to grant immunity from the antitrust laws and thereby foreclose competition from existing public utilities such as Alabama Power Company.

Resort to the legislative history is not necessary to determine that the intent of Congress was to avoid the creation of competition with existing utilities. Such intent is expressed in

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[8] "... Practically the entire debate on the limiting clause [the central station service limitation] here under discussion centered about the question of competition. It seems clear from the legislative history that the intent of the limitation was to prevent loans that would create federally financed competition with existing utility enterprises. ...

"Where the effect of a proposed loan, regardless of its essential purpose, would be to substitute a competitive REA-financed service to persons already served, the loan may not be made. ..." (Opinion No. 4506 by Robert H. Shields, Solicitor of the Department of Agriculture, dated November 24, 1942)

"Congressional debates and committee hearings contain frequent references to the clause in question [the central station service provision]; but, as has been noted, these discussions were generally concerned with the question of competition ... This distinction serves to emphasize the point that the interest of Congress, in this provision, was to prevent competition with established utilities." (Opinion No. 5427 by W. Carroll Hunter, Solicitor of the Department of Agriculture, dated November 3, 1948)

Section 4 of the Rural Electrification Act of 1936, 7 U.S.C. § 904 (Appendix C, page 61a), by the provision limiting loans to provide electric power "to persons in rural areas who are not receiving central station service." As stated by Circuit Judge Godbold in his dissenting opinion:

> "It is beyond question that the purpose of the central station service provision of § 904 was to give private utilities some measure of protection from competition created as a result of REA loans. Protection from lawful competition of REA-financed borrowers has been held not a constitutional entitlement and a matter for relief solely in Congress. But it flies in the teeth of the Congressional intent expressed in § 904—protection of private utilities from a described area of competition—to distill the same § 904 into an authorization to the Administrator to require, with impunity and immunity, action that freezes out the private utility as a competitor. By some unrevealed process of alchemy the partial shield given the private utility against the REA borrower by § 904 is converted into a sword in the borrower's hands." (394 F.2d 672, 683-684 and Appendix A, pages 25a-26a)

It therefore follows that Congress did not intend by the Rural Electrification Act to grant immunity from the antitrust laws. The holding below which attributes by implication an antitrust immunity to the provisions of such Act is erroneous and in conflict with *California v. Federal Power Commission*, 369 U.S. 482 (1962), and *United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). Moreover, such decision passes any

immunity which the Administrator of REA might enjoy down to Alabama Electric Cooperative, Inc. (an Alabama corporation) and to those with which Alabama Electric Cooperative, Inc. contracts. It is therefore also in conflict with *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381 (1939). For if after a full hearing of the evidence it were found that the REA Administrator acted within the outer perimeter of his authority[9] and he is thereby given some form of immunity, he still cannot serve as a conduit through which such immunity can be passed to others. *Keifer & Keifer v. Reconstruction Finance Corporation, supra.*

Reason III: The decision below is in conflict with the recent decision of the United States Court of Appeals for the District of Columbia in *City of Paris v. Federal Power Commission*, decided July 18, 1968.

The status of borrowers of REA funds, whether such borrowers are (a) electric cooperatives organized as private corporations under state law, (b) other private corporations, (c) municipal corporations, or (d) other authorized borrowers, presents an important question not heretofore determined by this Court. The decision below has held that Alabama Electric Cooperative, Inc., a rural electric cooperative organized as a private corporation under the laws of Alabama, *is an instrumentality* of the United States (394 F.2d 672, 677 and Appendix A, page 11a). Such decision is in *direct conflict* with

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[9] This is a much controverted question of fact which petitioner was not afforded the opportunity to have judicially determined since the complaint was dismissed without a hearing.

the decision of the Court of Appeals for the District of Columbia Circuit decided July 3, 1968, in *City of Paris v. Federal Power Commission,* Case Number 21,375. The *City of Paris* decision expressly held that rural electric cooperatives which borrow REA funds *are not government instrumentalities:*

In reaching the decision that rural electric cooperatives are instrumentalities of the United States, the court below seems to have confused the Rural Electrification Administration (which is obviously an instrumentality of the United States) with the countless rural electric cooperatives organized as separate corporations under the laws of the respective states (394 F.2d 672, 677 and Appendix A, page 11a). It relied upon a Federal Power Commission decision (*Dairyland Power Cooperative*, 37 F.P.C. 12, 35 L.W. 2385) and a decision of the Court of Appeals for the District of Columbia (*Salt River Project Agricultural Improvement & Power District v. F.P.C.*, 391 F.2d 470).

In the *City of Paris* case, *supra,* the Court of Appeals for the District of Columbia noted that the *Dairyland* decision was never directly subjected to judicial scrutiny and noted further that in the *Salt River* case the Court of Appeals for the District of Columbia had "carefully avoided reaching the question whether REA-financed cooperatives" are government instrumentalities (page 5 of the slip opinion of July 3, 1968, Case Number 21,375, United States Court of Appeals for the District of Columbia Circuit). In the *City of Paris* case the court faced such question for the first time and held that rural electric cooperatives are *not* instrumentalities of the government. In so holding, the Court of Appeals for the District of Columbia stated:

"It is true that the Rural Electrification Act was an attempt by Congress to bring economical electric power to rural areas through rural electrification cooperatives, and that the Rural Electrification Administration, which makes low-interest loans to such incipient cooperatives, does exercise considerable supervision over them. But this connection with the REA is not, we think, of such magnitude as to make the cooperative borrowers instrumentalities of the federal government. The cooperatives do not perform an inherent governmental function, nor have they become so assimilated or incorporated into government as to become one of its constituent parts. The funds advanced to the cooperatives are not spent or used on behalf of government or in the performance of any governmental function. The benefits of the loan inure primarily to the cooperatives' constituent members. That the public interest in rural electrification is also served thereby is not enough to make the cooperatives themselves instrumentalities.

"REA-financed cooperatives are private nonprofit corporations organized for the benefit of their consumer-owners. They are neither operated nor controlled by any government, federal, state or local. Nor are they operated or controlled by the Rural Electrification Administration or any other government agency. The control and authority exercised over them by the REA relates primarily to the REA loan and the protection of the United States' security interest in the cooperatives' operations. But the voluntarily entered contract with REA does not,

we think, alter the nature of the cooperatives' independent corporate existence. 'The control reserved by the Government for protection of a governmental program and the public interest is not incompatible with the retention of the status of a private enterprise.' *Buckstaff Bath House Co. v. McKinley*, 308 U.S. 358, 363 (1939).

"In the proceedings before the Commission in *Dairyland* and in *Salt River*, neither the Secretary of Agriculture, who intervened, nor the Rural Electrification Administration itself ever contended that REA-financed cooperatives were instrumentalities of the United States Government. On the contrary, the Rural Electrification Administration has taken the position that cooperative-owned electric systems are 'independent businesses' controlled by their 'owner-mangers.' We agree that such cooperatives are, as presently organized and financed, not government instrumentalities under Section 201(f) of the Federal Power Act." (Pages 6-8 of the slip opinion of the United States Court of Appeals for the District of Columbia entered July 2, 1968 in *City of Paris v. Federal Power Commission*, Case Number 21,375)

The decision of the court below is in direct conflict with the above reasoning and the holding in the *City of Paris* case. This conflict necessarily results in rural electric cooperatives in certain states being treated as government instrumentalities while those in other states would not be so treated if the courts in such states elected to follow the *City of Paris* decision. Moreover, since in many cases there is an election between

appealing to the "home" circuit court of appeals or to the Circuit Court of Appeals for the District of Columbia, it will be possible for the same rural electric cooperative to be treated differently in two separate cases.

The conflict between the Fifth Circuit and the District of Columbia Circuit with respect to whether rural electric cooperatives are instrumentalities of the United States *vel non* is an important question of federal law which has not been, but should be, settled by this Court. Should the decision of the Fifth Circuit stand, questions would arise as to whether such cooperatives, as instrumentalities, would be subject to state taxation, would be subject to suit by anyone for any purpose without consent of Congress, or would be subject to the provisions of the National Labor Relations Act or the Fair Labor Standards Act concerning their employees. Other important questions remain unanswered so long as their status is unsettled.

Reason IV: The decision below involves a federal question decided in conflict with *Hardin v. Kentucky Utilities Company*, _____ U.S. _____, 19 L. Ed. 2d 787 (Case No. 40 decided January 16, 1968).

The decision below held that Alabama Power Company has no standing to have a hearing on the merits to determine if the Administrator of REA went outside the range of permissible choices contemplated by the Rural Electrification Act of 1936 when he participated in and became a party to the 35 year monopolistic contracts which violate the antitrust laws (laws

intended by Congress to protect petitioner's competitive interests). Such decision is in *direct conflict* with the decision of this Court in *Hardin v. Kentucky Utilities Company*, _____ U.S. _____, 19 L. Ed. 2d 787 (Case No. 40 decided January 16, 1968).

In *Hardin* the plaintiff complained that Tennessee Valley Authority violated express provisions of a statute; in this case petitioner complains that the Administrator of REA violated the express prohibitions of Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. In *Hardin* the plaintiff's standing to sue was based upon Congress' intent to protect a competitive interest; in this case petitioner's standing to sue is based upon particular statutory provisions of the antitrust laws reflecting Congress' intent to protect a competitive interest, which standing is fortified and expressly conferred by Section 16 of the Clayton Act, 15 U.S.C. § 26 (Appendix C, page 61a). In *Hardin* a full hearing on the merits was held to determine if TVA's actions were "outside the range of permissible choices contemplated by the statute;" in this case petitioner has been denied a hearing on the merits to determine if the REA Administrator went "outside the range of permissible choices contemplated by the statute" when he required and became a party to 35 year market foreclosure contracts proscribed by the antitrust laws.[10] In *Hardin* this Court expressly confirmed standing to sue as had the district court and the Court of Appeals for the Sixth Circuit; in this case the majority opinion

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[10] In *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949), the court stated: "There may be, of course, suits for specific relief against officers of the sovereign which are not suits against the sovereign. . . . where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. . . ."

below has not only denied standing to sue the REA Administrator, but also denied standing to sue a private Alabama corporation, Alabama Electric Cooperative, Inc. Yet the same cases cited by the majority opinion below against standing [*Alabama Power Company v. Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Company v. T.V.A.*, 306 U.S. 118 (1939); *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955); and *REA v. Central Louisiana Electric Co., Inc.*, 354 F.2d 859 (5th Cir. 1965)] were argued to this Court in *Hardin* and rejected by this Court as not applicable where the plaintiff was suing to enforce statutory provisions (in this case, the antitrust laws) enacted by Congress to protect a competitive interest.

The decision below indicates that it is the view of the majority that no suit could be maintained against the Administrator of REA for his violations of the antitrust laws in the absence of a specific provision in the Rural Electrification Act authorizing judicial review of his actions. *Hardin* teaches otherwise. There the same contention was made, i.e., that Kentucky Utilities could not review the actions of TVA because there was no specific provision in the TVA Act authorizing such review. This court totally rejected this contention and stated:

> "... it has been the rule at least since the Chicago Junction Case, 264 U S 258, 68 L ed 667, 44 S Ct 317 (1924), that when the particular statutory provision invoked does reflect a legislative purpose to protect a competitive interest, the injured competitor has standing to require compliance with that provision. See Alton R. Co. v United States, 315 US 15, 19, 86 L ed 586, 593, 62 S Ct 432 (1942); Chicago v Atchison,

T.&S.F.R. Co., 357 US 77, 83, 2 L ed 2d 1174, 1180, 78 S Ct 1063 (1958).

* * *

"... Since respondent is thus in the class which § 15d is designed to protect, it has standing under familiar judicial principles to bring this suit, see Stark v. Wickard, 321 US 288, 309, 88 L ed 733, 747, 64 S Ct 559 (1944); cf. United States v ICC, 337 US 426, 433-434, 93 L ed 1451, 1458, 1459, 69 S Ct 1410 (1949), and *no explicit statutory provision is necessary to confer standing.*" (Emphasis supplied) (19 L. Ed. 2d 787, 792-793)

In this case, as in *Hardin,* there is a statute (the antitrust laws) designed to protect a competitive interest (i.e., to be free from unlawful monopolistic practices); petitioner is in the class which the antitrust laws were designed to protect; and "no explicit statutory provision is necessary to confer standing."

It seems beyond rational question that, if the plaintiff in *Hardin* had standing to sue TVA for allegedly violating a provision in the TVA Act enacted for plaintiff's benefit, petitioner Alabama Power Company has any less standing to sue the REA Administrator for allegedly violating the antitrust laws by the 35 year market foreclosure contracts. There can be no doubt that the antitrust laws were passed for petitioner's protection. Any possible doubt in this regard is removed by Section 16 of the Clayton Act, 15 U.S.C. § 26 (Appendix C, page 61a), which clearly confers such standing. As stated by Circuit Judge Godbold in his dissenting opinion below:

> "Insofar as the antitrust laws are concerned, this court need not pause on the inquiry—over which the parties do mighty battle in their briefs—of attack on the loan vs. attack on the requirement contracts as an incident of the loan. The Power Company has standing to attack the contracts standing alone, whether or not the Administrator is a formal party thereto, and to attack the broader range of activities of which the contracts are a part and in which the parties defendant are charged as participants." (394 F.2d 672, 692 and Appendix A, page 43a)

The respondents, in their brief in opposition to this petition, will doubtless continue to argue the applicability of *Alabama Power Company v. Ickes*, 302 U.S. 464 (1938); *Tennessee Electric Power Company v. T.V.A.*, 306 U.S. 118 (1939); and *Kansas City Power & Light Co. v. McKay*, 225 F.2d 924 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 884 (1955). But such cases are no more applicable here than they were in *Hardin*, wherein their applicability was also argued and the Court of Appeals for the Sixth Circuit stated:

> "... Their *(Ickes, T.V.A.* and *Kansas City)* surface analogy is immediately dissipated by the fact that in none of them was the plaintiff's suit planted on a federal statute enacted specifically for the protection of the involved plaintiff...." (375 F.2d 403, 416)

Here, petitioner's suit is predicated on the antitrust laws enacted specifically for petitioner's protection. These laws contain provisions expressly conferring standing to sue. Material

features which distinguish such three cases from this case may be summarized as follows:

1. This case is expressly brought *under* the procedural sections of the antitrust laws to enjoin violations thereof; *Ickes, T.V.A.* and *Kansas City* were not. Standing in *Ickes* and *T.V.A.* was asserted under general equity principles and standing in *Kansas City* was asserted only under the Administrative Procedure Act.

2. This case is based upon federal statutes (the antitrust laws) specifically enacted for the protection of petitioner; *Ickes, T.V.A.* and *Kansas City* were not.

3. This case involves unlawful competition in violation of the antitrust laws; *Ickes, T.V.A.* and *Kansas City* all involved competition found by the trial courts to be lawful. In *Ickes* and *T.V.A.* the court specifically found no conspiracy.

4. There has been no hearing on the merits in this case to determine the serious factual issues presented by the complaint. In *Ickes, T.V.A.* and *Kansas City* there was a full hearing on the merits and factual issues resolved by the trial court.

5. In this case, a private Alabama corporation is a defendant. In *Ickes, T.V.A.* and *Kansas City* all the defendants were governmental defendants.

Principles stated by this Court in *T.V.A.* and *Ickes* actually confirm petitioner's standing to sue. *T.V.A.* holds that standing to sue exists if agency action has invaded a "legal right"—"one founded on a statute which confers a privilege." *Tennessee Electric Power Co. v. T.V.A.*, 306 U.S. 118, 137 (1939). *Ickes* stands for the same principle. *Alabama Power Company v. Ickes*, 302 U.S. 464, 479 (1938). The antitrust laws do confer upon petitioner a privilege, the privilege to be free from unlawful competition. *Ickes* also stated that "If conspiracy or fraud or malice or coercion were involved a different case would be presented" *(supra,* at page 479). And the complaint in this case does allege both conspiracy *and* coercion (R 12).

Reason V: The decision below has improperly applied and extended *Barr v. Matteo*, 360 U.S. 564 (1958), and the writ should be granted so that this Court's holding in *Barr* can be clarified.

The case of *Barr v. Matteo*, 360 U.S. 564 (1958), relied upon by the court below is not applicable to this case. *Barr* and the principal case upon which it was based, *Spalding v. Vilas*, 161 U.S. 483 (1896), both involved a *personal* damage suit for libel brought against a government official and were concerned with privileged statements made within the limits of the official's authority. In *Barr* this Court clearly stated that the reason for privileges against personal libel suits was to prevent the official, in defending such a personal attack, from consuming "time and energies which would otherwise be devoted to governmental service" (p. 571). This case is not the same as a personal damage suit against an official. The "time and energies" consumed by the governmental defendants in accounting for their action would be a proper part of their governmental service. It is certainly encumbent on a government official to cooperate in a

judicial exploration of the impact of the antitrust laws on the activities of his agency, especially when the activities in question are expected to be pursued in the future. Moreover, in *Barr* there was a trial and the outer perimeter boundaries were determined. There has been no hearing in this case. The court below has thus improperly extended this Court's holding in Barr.

It is significant that this Court in *Barr* was split five (Mr. Justices Harlan, Frankfurter, Clark, Whittaker and Black) to four (Chief Justice Warren and Mr. Justices Douglas, Brennan and Stewart) and one of the majority, Mr. Justice Black, wrote a special concurring opinion based solely on the fact that Congress had not forbidden the giving of press releases by the government official. In this case Congress has expressly forbidden restraints upon trade. Likewise, it has forbidden REA from making a loan to serve only those already receiving electric power from central station service.

Reason VI: **The decision below is in conflict with other decisions of the courts of appeal.**

The decision below is in conflict with *Harman v. Valley National Bank of Arizona*, 339 F.2d 566 (9th Cir. 1964) and *Bankers Life and Casualty Co. v. Larson*, 257 F.2d 377 (5th Cir. 1958), *cert. denied*, 350 U.S. 884. These cases hold that the antitrust laws apply to actions of a governmental employee where the employee, without *specific* sovereign approval, conspires with private individuals to violate the antitrust laws and where such employee becomes a participant in a private agreement between others for restraint of trade.

Eastern Railroad Presidents Conference v. Noerr, 365 U.S. 127, 136 (1961), dictum[11] from which is cited by the court below (394 F.2d 672, 677 and Appendix A, pages 10a-11a) did not deal with an unlawful combination of the character sought to be outlawed by the Sherman Act. There the action complained of was a combination of railroads *(there was no governmental defendant)* seeking to induce the passage of specific legislation. This Court properly held in *Noerr* that such type of activity, i.e., a combination as a part of an attempt to bring about legislative action, was not such a combination as was prohibited by the Sherman Act. In so holding and in delineating the type of action which the Sherman Act was intended to reach, this Court emphasized that the Sherman Act was intended to reach only combinations which have as their objective interfering with the freedom of trade, establishing price-fixing agreements, entering into exclusive marketing agreements, or other similar business arrangements, the effect of which would be to restrain trade. Thus, this Court stated in *Noerr*:

> "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly . . . . " (365 U.S. 127, 136)

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[11] The majority opinion below quotes from *Noerr* for the proposition that a restraint upon trade which is the result of valid governmental action, as opposed to private action, does not violate the Sherman Act. While such a statement is contained in *Noerr* it is nevertheless dictum to such case for the reason that (a) no governmental action was involved therein but only an effort by private individuals to influence the passage of a legislative (governmental) act; (b) no governmental defendant was involved therein, and (c) no restraint upon trade of the character intended to be proscribed by the Sherman Act was present therein.

In the case now before this Court, petitioner charges the very type combination and conspiracy pointed out in *Noerr* to be the type proscribed by the Sherman Act, i.e., a conspiracy to establish an exclusive market and to prevent the distributing cooperatives and petitioner from dealing with one another. *Noerr* specifically noted that there were "no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers" (365 U.S. 127, 142). In the case now before this Court, there are specific allegations that the defendants directly attempted to persuade, and did persuade, the distributing rural electric cooperatives not to deal with petitioner for the balance of the twentieth century.

Parker v. Brown, 317 U.S. 341 (1943), likewise relied upon by the court below cannot be used to justify the violation of the antitrust laws which has been alleged in the complaint in this case. The activities complained of in *Parker* were at the *specific* direction of the sovereign and the *specific* end sought by the sovereign was an end which otherwise would be proscribed by the antitrust laws. Equally significant is the fact that in *Parker* there was no charge that the state or one of its employees had entered into a conspiracy to restrain trade.

United States v. Rock Royal Cooperative, Inc., 307 U.S. 533 (1939), is equally inapplicable. No governmental agency or governmental official was included as a defendant. More significant, however, *Rock Royal* dealt with acts of private individuals or corporations in complying with an order of the Secretary of Agriculture entered pursuant to the *express* provisions of an act of Congress, the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246. There can be no question but that the Secretary of Agriculture there had the authority

from Congress to enter the order with which the defendants were complying. A fair and correct analysis of *Rock Royal* is simply to the effect that the same Congress which adopted the Sherman Act can likewise adopt a later act which authorizes actions which otherwise would violate the Sherman Act. The establishment of that principle, however, does not establish that Congress has in the Rural Electrification Act of 1936 authorized the conspiracy of which complaint is herein made.

CONCLUSION

The decision below is manifestly incorrect and deprives petitioner of the opportunity to protect its legal rights. It creates a dangerous principle which is being applied on a broad scale and is susceptible of even broader and more dangerous application. It is contrary to settled law and will result in confusion. Therefore, for the reasons set forth above, petitioner respectfully prays that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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